SUBTERRANEAN NATURAL MINERAL WATER SDN BHD

v.

KHO BOON KWANG

HIGH COURT SABAH AND SARAWAK, KUCHING
ZAKARIA SAM JC
[CIVIL APPEAL NO: 12-42-2000-III(II)]
26 MARCH 2002

COMPANY LAW: *Suit against company - Appointment of advocate by official receiver - Authorisation of court or committee of inspection - Whether necessary - Whether advocate has locus standi - Distinction between 'assists liquidator in his duties' and 'defend any action' - Companies Act 1965, ss. 236(1)(e) and 236(2)(a)*

The 2nd defendant had been served with a winding up order and the official assignee was appointed as the official receiver of the company. Subsequently, the plaintiff obtained a judgment in default against the 2nd defendant. They applied to set aside the judgment in default and the official assignee appointed M/s Battenberg & Talma ('the advocate') to represent the 2nd defendant. The plaintiff objected to, *inter alia*, the appointment of the advocate contending that the advocate did not have the locus standi to represent the 2nd defendant. The sessions judge upheld the plaintiff's objection and dismissed the 2nd defendant's application. Hence, this appeal by the 2nd defendant.

The main issue here was whether the official assignee was correct in appointing the advocate in absence of the court's, or the committee of inspection's, proper authority as per s. 236(1)(e) of the Companies Act 1965 ('the Act').

Held:

[1] Under s. 236(1)(e) of the Act, assisting the liquidator in his duties would involve assisting in the daily management of the company. The aforementioned provision does not encompass the appointment of an advocate under s. 236(2)(a) of the Act to defend a company. (p 343 a-b)

[2] A liquidator could not, by himself, commence or defend any action or other legal proceedings in the name or on behalf of the company. To do so necessitates the appointment of an advocate. (p 343 b-c)

[3] The plaintiff's preliminary objection was struck off. Therefore, the advocate has the locus to represent the 2nd defendant and their appeal was allowed with costs. (p 344 a)

[Appeal allowed with costs.]

Case(s) referred to:

Bensa Sdn Bhd (in liquidation) v. Malayan Banking Bhd & Anor [1993] 2 CLJ 68 ***(not foll)***

Kang Wah Construction Sdn Bhd v. Chan Ai Min Property Sdn Bhd & Anor [1999] 7 CLJ 172 ***(foll)***

Kosmopolitan Credit & Leasing Sdn Bhd v. Yeo Heng Heang & Ors [1996] 6 MLJ 725 ***(dist)***

Selvam Holdings (M) Sdn Bhd v. Toby Lam (as Receiver and Manager as well as the Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor [1994] 4 CLJ 899 ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 226(3), 236(1)(e), (2)(a), (i)

For the appellant - Maris Agan; M/s Battenberg & Talma
For the respondent - Baxter Michael; M/s Ee & Lim

Reported by M Maheswaran

JUDGMENT

Zakaria Sam JC:

Background

On 14 June 1997, judgment in default was entered by the plaintiff against the 2nd defendant (the appellant herein) for the sum of RM130,000, of which RM100,000 being money paid to the 2nd defendant as a deposit for a proposed joint - venture which did not materialise and the sum of RM30,000 being the expenses incurred by the plaintiff for the benefit and on behalf of the 2nd defendant.

The 2nd defendant then on 29 June 2000 filed an application to set aside the said judgment in default on the grounds that:

(a) the said judgment in default of appearance is irregular as a winding-up order had been made against the 2nd defendant on 6 December 1996 and the official assignee Malaysia was appointed as the official receiver of the company; and

(b) the plaintiff did not obtain the leave of court under s. 226(3) of the Companies Act 1965, to proceed or continue the action against the 2nd defendant.

However, for the purpose of this application, consent has been given by the official receiver to M/s Battenberg & Talma through a letter dated 25 June 1999 to defend this action on behalf of the 2nd defendant.

At the hearing of the said application on 9 November 2000 the plaintiff (the respondent herein) raised the following preliminary objections:

(a) That M/s Battenberg & Talma has no *locus standi* in respect of the 2nd defendant's said notice of application;

(b) That Mr Stanley Eddy has no authority to make the affidavit on behalf of the 2nd defendant.

The learned sessions court judge in upholding the plaintiff's objection dismissed the 2nd defendant's application on 9 November 2000. Against the said order, the 2nd defendant filed this notice of appeal.

The only issue in this appeal is whether the appointment of M/s Battenberg & Talma by the official receiver to defend the 2nd defendant, without the authorisation of the court or the committee of inspection as stipulated under s. 236(1) of the Act was a valid appointment.

The learned counsel for the plaintiff submitted that M/s Battenberg & Talma were appointed without the proper authority of the court or the committee of inspection. Therefore, the said appointment was in breach of s. 236(1)(e) of the Act which provides that:

> The liquidator may with the authority either of the Court or of the committee of inspection appoint an advocate to assist him in his duties.

It was further explained that s. 236(2)(a) must be taken to mean that the decision to institute or defend any suit is the discretion of the liquidator. The liquidator cannot unilaterally delegate this discretion. However, if the liquidator propose to delegate or appoint an advocate to assist him, he must obtain the sanction of the court or the committee of inspection under s. 236(1)(e).

The learned counsel for the 2nd defendant in his submission urged this court to refer to s. 236(2)(a) of the Act which read:

> The liquidator may bring or defend any action or other legal proceedings in the name and on behalf of the company.

and proceeded to submit that the power of the liquidator under s. 236(2)(a) of the Act to bring or defend an action on behalf of a company in liquidation must necessarily include the power to appoint an advocate for that purpose.

In my opinion s. 236(1)(e) talks about the liquidator appointing an advocate **to assist him running the business** of a company in liquidation (emphasis added). Assisting a liquidator in his duties here, to my mind, is to assist the liquidator in running the day to day management of the company. Appointing an advocate to defend an action or other legal proceedings in the name and on behalf of the company as enunciated under s. 236(2)(a) does not fall under the category of assisting a liquidator in his duties. The appointment of an advocate to defend the company in court is not considered as assisting the liquidator in the running or managing the company. A liquidator by himself cannot bring or defend any action or other legal proceedings in the name and on behalf of the company. He needs the services of a counsel for that purpose. A company must be represented by a counsel to either commence or defend an action. My stand here is fortified further by the decision of Abdul Aziz J in *Selvam Holdings (M) Sdn Bhd v. Toby Lam (as Receiver and Manager as well as the Liquidator of Selvam Holdings (M) Sdn Bhd) & Anor* [1994] 4 CLJ 899 where the learned judge held that the power to commence an action as well, must necessarily include the power to appoint an advocate for the purpose. This decision was also adopted by Ian Chin J in *Kang Wah Construction Sdn Bhd v. Chan Ai Min Property Sdn Bhd & Anor* [1999] 7 CLJ 172.

Therefore, I most respectfully disagree with the decision in *Bensa Sdn Bhd (in liquidation) v. Malayan Banking Bhd & Anor* [1993] 2 CLJ 68 where it was held that, in the absence of the authority granted by the court or by the committee of inspection, the counsel for the liquidator has no *locus standi*.

As for the case of *Kosmopolitan Credit & Leasing Sdn Bhd v. Yeo Heng Heang & Ors* [1996] 6 MLJ 725 which was cited by the learned counsel for the plaintiff, the facts of which are distinguishable. In that case, the plaintiff company under liquidation sued the defendants on a loan. The action was commenced *via* Ler Cheng Chye and Lim Tuck Cheong (the receivers and managers of the company before liquidation) who claimed to have derived the authority to initiate the proceedings from the liquidator. It was held by KC Vohrah J (as he then was) that both the former receivers and managers ceased be receivers and managers of the company once the order of winding up was made in respect of the company. The liquidator did not have the power to appoint receivers and managers to initiate the proceedings. The power of instituting any suit is the discretion of the liquidator and this discretion could not be delegated to an agent was clearly specified under s. 236(2)(i).

Conclusion

Based on the above reasons, I find that the preliminary objections of the plaintiff are devoid of merit. The appeal by the 2nd defendant is hereby allowed with costs.